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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 73-74

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE; MITSUI STEAMSHIP CO., LTD., ET AL.,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondents.

REPLY OF RESPONDENT, ISBRANDTSEN COMPANY, INC., IN OPPOSITION TO MOTION OF ASSOCIATED STEAMSHIP LINES (MANILA) ET AL. TO FILE BRIEF AMICUS CURIAE.

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OCTOBER 1, 1957.

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JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE; MITSUI STEAMSHIP CO., LTD.; KAWASAKI KISEN KAISHA; NISSAN KISEN KAISHA, LTD.; TOHO KAIUN KAISHA, LTD.; IINO KAIUN KAISHA, LTD.; MITSUBISHI KAIUN KAISHA, LTD.; KOKUSAI KAIUN KAISHA, LTD.; NIPPON YUSEN KAISHA; OSAKA SHOSEN KAISHA, ETD; SHINNIHON STEAMSHIP CO., LTD.; YAMASHITA KISEN KAISHA; WILHELMSENS DAMPSKIBSAKTIESELSKAB; A/S DEN NORSKE AFRIKA-OG AUSTRAILIELINIE; A/S TONSBERG; A/S TANKFART I; A/S TANKFART IV; A/S TANKFART V; A/S TANKFART VI; SKIBSAKTIESELSKAPET VARILD; SKIBSAKTIESELSKAPET MARINA; AKTIESELSKABET GLITTRE; DAMPSKIBSINTERESSENTSKABET GARONNE; SKIBSAKTIESELSKAPET SANGSTAD SKIBSAKTIESELSKAPET SOLSTAD; SKIBSAKTIESELSKAPET SILJESTAD; DAMPSKIBSAKTIESELSKABET INTERNATIONAL; SKIBSAKTIESELSKAPET MANDEVILLE; SKIBSAKTIESELSKAPET GOODWILL; DAMPSKIBSELSKABET AF 1912 AKTIESELSKAB; AKTIESELSKABET DAMPSKIBSSELSKABET SVENDBORG; SKIBSAKTIESELSKAPET IGADP; A/S BESCO; AKTIESELSKAPET IVARANS REDERI; A/S LISE; THE DE LA RAMA STEAMPSHIP CO.; INC.; THE OCEAN STEAM SHIP CO., LTD.; THE CHINA MUTUAL STEAM NAVIGATION COMPANY, LTD.; NEDERLANDSCHE STOOMVAART MAATSHAPPIJ "OCEAN" N.V.; THE SWEDISH EAST ASIA CO., LTD.; WATERMAN STEAMSHIP CORPORATION; LYKES BROS. STEAMSHIP CO., INC.; UNITED STATES LINES COMPANY; STATES MARINE CORPORATION; STATES MARINE CORPORATION OF DELAWARE; DAIDO KAIUN KAISHA; AMERIGAN PRESIDENT LINES, LTD.; *Petitioners,*

—against—

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., AND EZRA TAFT BENSON, Secretary of Agriculture; *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY OF RESPONDENT, ISBRANDTSEN COMPANY, INC., IN OPPOSITION TO MOTION OF ASSOCIATED STEAMSHIP LINES (MANILA) ET AL. TO FILE BRIEF AMICUS CURIAE.

Statement

The "reasons for withholding consent" [Rule 42(3)] to the proposed filing of such a brief *amicus curiae* are as follows:

Under date of July 3, 1957, Counsel for Isbrandtsen received a letter from a New York City firm of attorneys, Casey Lane & Mittendorf, asking, together with the law firm of Kirlin, Campbell & Keating, of that City, the consent of Isbrandtsen to file such a brief "on behalf of approximately thirty-five steamship conference and their member lines."

Isbrandtsen counsel had no information about the first named law firm, and knew that neither law firm had participated, in any hearing before the Maritime Authorities, within the past nine (9) years involving the use of the exclusive-patronage system. No copy of the proposed brief accompanied said letter to Isbrandtsen's Counsel, who replied he would not consent, "believing the opposition to our side will be adequately presented by the Conference involved and the Government Agency, and that no other Conference or their representatives could contribute further."

For at least the past ten (10) years, during which this issue has been most acutely before the Maritime Authorities and in the Courts, that Agency has been more than diligent and active in defending each and every Conference in its claimed right to employ the dual rate system in the Conference trades, as witnessed by the application herein of the Federal Maritime Board for Certiorari, as heretofore in another case, and its brief herein, of seventy-five (75) pages, signed by five (5) lawyers, not directly, even chiefly, in defense of the right of the particular Conference involved to use the System, but of all Conferences under like circumstances.

Under Rule 42(4) of this Court the Federal Maritime Board could have filed its brief herein, as *amicus curiae*, without the necessity of any consent, and without its being a party to the case. Instead that Agency has retained

"special counsel" appearing on its brief, which Counsel is regularly retained by one of the largest Petitioner steamship lines which belongs to not only the Petitioner conference but to 12 of the so-called Movant conferences, who will undoubtedly argue before this Court, in behalf of all Conferences. This Agency brief was filed at the same time the Conference involved filed its brief of ninety-three (93) pages, signed by eight (8) lawyers.

Those thirteen (13) lawyers for the Appellants have surely covered the field, with little likelihood that six more lawyers, as *amici curiae* "could contribute further."

On August 5, 1957, the Motion to so file a brief *Amicus Curiae* was filed in this Court, with a letter that it had been duly "served" on the parties.

Counsel for Isbrandtsen was not aware that formal service was made on him when one copy of the Motion was left at his New York office, which is not his address in this Proceeding, but upon his return to his Washington office, from vacation, on August 19th, within three days he telephoned the office of the Clerk of this Court and was advised that under Rule 42 he could file an opposition to the Motion "seasonably", which meant at any time before the convening of this Court on October 7, 1957.

It was only on September 24, 1957, on further personal inquiry at the Clerk's office did Isbrandtsen's Counsel learn that such proceedings for leave to file are treated as "Motions" and should be answered within twenty (20) days, which would have expired on August 20, 1957, and that any answer to matters in the brief should be included within said opposition—information which was new to Counsel.

For the foregoing reasons Isbrandtsen's Counsel respectfully requests that the Court accept and consider this reply in opposition despite its being filed late under some technicality of the Rules.

A. OUR OPPOSITION TO THE MOTION

In answer to the Motion of the Associated Steamship Lines (Manila) et al. for leave to file a Brief *amicus curiae*, Respondent, Isbrandtsen Company, Inc., states the following:

The movants have stated no valid reason why they should be allowed to file a Brief *amicus curiae* herein, and they would seek only to subvert the office of an *amicus curiae* for the use of litigants already in this case and also seek to confuse the legal issues and distort the facts of record before this Court.

There are compelling and basic reasons why the instant Motion is defective and why it should be promptly denied by this Court, viz.:

I. THERE IS MISREPRESENTATION AS TO THE PERSONS TO BE REPRESENTED IN THE BRIEF AMICUS CURIAE.

The following first statement in the Motion is not correct, to wit, that the listed "one hundred fifteen common carrier steamship lines comprise (the) membership of 'the thirty-five conferences' " for the reason that said list of 115 does *not* include the steamship lines which are already parties to this appeal and which are listed on the cover and on the first page of the Motion. Those parties already in the case belong to one or more of said 35 conferences, for which this special plea, by way of *Amicus Curiae*, is to be made, and thus would have triple representation before this Court, by 19 lawyers, instead of the 13 already appearing—the lawyers for the Conference involved, the lawyers for the Board and by the lawyers making the Motion.

Therefore the statement on page 2 of the Motion that—

> "None of the moving steamship lines are parties to this action"

is as deceitful, as is the statement on page 4 of the Motion, that the "dual rate systems" of the movers "have been maintained over many years . . . with general recognition by Congress." For 41 years Congress has taken no action whatsoever, pertaining to the System.

II. THE MOVERS BOLDLY ADMIT THEIR PURPOSE IS TO GO FAR OUTSIDE THE RECORD IN THIS CASE.

On page 5 of the Motion this extraordinary, but frank statement is made.

> **"The parties to the case in the Court below and in this Court must necessarily concern themselves with the specific issues of the case. Movants believe that these issues need to be considered within a larger economic and historic framework than the petitioners and respondents could develop for the Court."**

That admission, in itself, should be sufficient to cause the denial of this Motion.

Such a statement surely does not comply with the requirements of Rule 42(3) that the Motion

> "shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties and their relevancy to the disposition of the case."

At the time of filing the Motion, the Movers had no information as to what "facts or questions of law . . . have

not been, or reasons for believing that they will not be adequately presented by the parties", etc., because the briefs of the Appellants, Conference and Board, were not filed until October 12 and 13, 1957, and we are confident that the Movers had not, on August 5, 1957, seen any drafts of said briefs.

III. MOVANTS WOULD SEEK TO SUBVERT THE OFFICE OF AN AMICUS CURIAE FOR IMPROPER PURPOSES.

1. Ordinarily, within the discretion of the Court, an attorney or other person may appear as an *amicus curiae* provided he is not partisan. The principles relating to the function and office of an *amicus curiae* are of long standing. It is well settled that the proper function of an *amicus curiae* is to assist and advise the Court, but such office cannot be subverted to the use of a *party* in the case. *Walker County Lumber Co.* v. *Edmonds*, 298 S. W. 610. Moreover, an attorney cannot appear as an *amicus curiae* if he is partisan, *Central Hanover Bank & Trust Co.* v. *Saranac River Power Corp.*, 278 N.Y.S. 203, and, of course, a regularly employed attorney of a party cannot appear as *amicus curiae*.

Not only are the present Movants partisan, but a substantial part of their membership is already represented as parties in the case, and *some of the attorneys listed on said Motion are regularly employed representing those 35 conferences, including the members thereof who are the present Petitioners.*

Of the thirty-five (35) conferences listed as the Movants, twenty-eight (28) conferences include as members one or more of the lines which are members of the Japan-Atlantic and Gulf Freight Conference, the chief Petitioner herein. Counsel for the Movants have conveniently and deliber-

ately eliminated the petitioner steamship lines from their Appendix A, which purports to list the common carrier steamship lines which are members of the Movants, but these facts are of public and official record at the Federal Maritime Board. Actually all of the Petitioner steamship lines should have also been listed in Appendix A to the Motion, which would demonstrate that seventeen (17) steamship lines were seeking to be in the unprecedented position of being in the case as parties and also as *amici curiae*.[1]

The grave impropriety of this Motion is astounding. Petitioners, Conference and steamship lines, are already fully represented by three sets of attorneys, plus the Federal Maritime Board, also a Petitioner.

Further, under our Point II supra, we point out that it is at least rather novel that Movants dare to seek to have greater rights than the parties to this case in presenting factual arguments to this Court. The parties have agreed to be confined to the facts of record before this Court, which limitation, as well as the issues, was laboriously worked out in a prehearing Stipulation encompassed in an Order and in an Amended Order in the Court below (R. 229, 234). Certainly it is well accepted that the right of an *amicus curiae* to be heard at this final stage of Appeal, in a matter which began in 1952, must be based on the Record before this Court (R. 153). Manifestly, the "*petitioners* and *respondents* will not," and cannot present arguments completely outside the Record, because they are confined to the issues and facts in the administrative Record now before

[1] The official records of the Board do not reflect any action of Petitioner steamship lines in withdrawing as members of the various Movant conferences. There is no way, of which we are aware, that only part of a Conference could be represented, nor have Counsel for Movants undertaken to present any such theory, rather have they attempted to evade their dilemma of double representation.

this Court. Movant Conferences, however, comprising also the Petitioner steamship lines, seek the extraordinary privilege of presenting to this Court extra-record factual arguments, even though the same be unfounded and possibly untrue.

B. THE PROPOSED BRIEF AMICUS CURIAE

At the outset of its brief in its "Statement of Interest", Movants state:

> "The parties on behalf of whom this brief amicus curiae is filed are thirty-five Conferences, Pacific American Steamship Association, . . ., and their common carrier member lines, operating to and from all the major ports of the United States in foreign commerce."

This is a repetition of the deception advanced in their Motion. In their claim of representing the "common carrier steamship Member lines" of said 35 conferences, and one Association, it is again apparent that they are attempting to represent, *amicus curiae*, seventeen (17) "member lines" who are already represented as petitioners and parties in this proceeding.

A cursory examination of the proposed Brief *Amicus Curiae*—and we do not feel called upon to do more—reveals purported factual arguments of the most contentious type, *without one single record citation.* Many of these fantasies presented have previously been disproven by Counsel for Isbrandtsen in the proceeding now before this Court.

Isbrandtsen has no desire to explore at length the many misstatements of fact and law which appear in the Brief, *Amicus Curiae*. The so-called legal arguments therein are so illogical, unsupported and even incoherent as to deserve no answer whatsoever. For example, proposed brief pp.

14 and 27, great emphasis is placed upon a so-called "Report" of the "Senate Committee on Interstate and Foreign Commerce" in 1950. That "Report" is in fact a document by "Mr. Magnuson *from* the Committee move . . ." and the "Committee" itself states that it "submit(s) the following *by* Senator Magnuson". Nowhere in said "Report" is there any indication of any hearings or the taking of any testimony, nor of any action even by the Subcommittee, of which Senator Magnuson was one of five (5) members, let alone any action whatsoever by the full "Committee". It is contended in the Brief that the "Senate Committee" in this "Report" gave some sort of endorsement to the exclusive patronage system, and found that it "appear[s] to be in the public interest" (Ibid., page 27). The argument is patently fallacious even if a report of a Congressional Committee, not relating to any legislation, and without any findings or recommendations on the subject, were possibly relevant.

At page 85 of said "Report", the litigation in the Courts concerning the exclusive patronage system is specifically noted, and the statement is made that, "Pending a decision by the Courts as to the legality of the practice, the *sub*committee does not believe it advisable to comment definitely upon this phase of the matter." Naturally, Senator Magnuson did not, after making such a disavowal, proceed to "endorse" the exclusive patronage system in any manner whatsoever. Also, at page 85 of the "Report", it is noted that it may be justified to allow carriers to participate in a "*conference* arrangement". Such is not an exclusive patronage system, and it is further stated that "*conference* arrangement[s] . . . would appear to be in the public interest." The present controversy before this Court does not concern the *Conference* system as such, which the Brief, *Amicus Curiae*, confuses and fails through-

out to distinguish from the dual rate system. The question at issue here is the legality of the exclusive patronage system which Petitioner Conference and its member lines would seek to employ. The above quotation is conveniently tailored in the Brief, *Amicus Curiae*, as if it applied to the exclusive patronage system rather than the Conference arrangement, by changing the subject of the sentence from "conference arrangements" to the "dual rate system" without quotes, of course.

There is nothing new in the way of any legal argument presented in the Brief *amicus curiae*. Every case, statute or writing cited in said brief, directly or indirectly concerning the exclusive-patronage system has been cited, analyzed and commented on at great length in the Board's 50 page Report (R. 19 to 69) and in the briefs of the Conference and its member lines and the brief of the Board except possibly the 1894 New York case, at common law, *Lough* v. *Outerbridge*, (143 N. Y. 271), (1894) which has previously received full discussion in the Board's determinations even though it antedated the 1916 Act by 22 years. See *Contract Rates—North Atlantic Continental Freight Conf.*, 4 F. M. B. 355 (1954).

The proposed brief also refers to *U. S.* v. *Prince Line*, 220 Fed. 230 (1915, before the 1916 Act) involving the *deferred* rebate system. That case, however, was reversed by this Court, as moot.

The proposed Brief *amicus curiae* contains only the most superficial discussion of the law which might be relevant to the case, which discussion is hardly worthy of any opponent's consideration, much less that of this Court. The entire approach of these Movants is as if the issue were *de novo*, and counsel on said proposed brief appear to be unfamiliar with what has been decided since 1916, either by the Maritime Authorities or by the Courts.

Rather than contributing to any real and thorough consideration of the issues involved and so long sought by Respondents to be determined, this proposed brief would relegate the discussion to the admitted confusion of at least a generation ago.

WHEREFORE, it is respectfully prayed by Respondent, Isbrandtsen Company, Inc., that this Court deny the aforementioned Motion to file a Brief *amicus curiae*.

Respectfully submitted,

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OCTOBER 1, 1957.

CERTIFICATE

I, John J. O'Connor, Counsel for Isbrandtsen Company, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1st day of October, 1957, I served copies of the foregoing Reply on counsel for all parties of record by mailing copies to their offices in duly addressed envelopes with postage prepaid, or by delivery to them in person.

JOHN J. O'CONNOR.

(7133-2)